No. 92-512

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, *ex rel.*, KEVIN M. ASLANIAN; RICHARD L'ITALIEN; GEORGIA UREMOVIC; and CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS;
Petitioners,

v.

PETE WILSON, Governor, State of California; LONNIE CARLSON, Director, California State Department of Social Services; STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES; SACRAMENTO COUNTY, BOARD OF SUPERVISORS; PENELOPE CLARKE, Director, Sacramento County Department of Social Services; SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In an action under the False Claims Act brought by private persons, does the court lack subject matter jurisdiction where the action is based on court records, transcripts of court proceedings and a newspaper article?

2. In an action under the False Claims Act brought by private persons, are these persons "original sources" under 31 U.S.C. section 3730(e)(4)(B) where they did *not* provide information upon which the action is based to the Federal Government before filing the action?

3. Did the district court abuse its discretion (1) by not allowing petitioners' to amend their complaint, or (2) by denying petitioners' motion for reconsideration?

LIST OF PARTIES

Respondents George Deukmejian, Linda McMahon, and Dennis Hart no longer hold their public offices. Their successors in office, Pete Wilson, Lonnie Carlson, and Penelope Clarke, respectively, are automatically substituted pursuant to Federal Rules of Civil Procedure, Rule 25(d).

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STATUTE INVOLVED

The only relevant statute is 31 United States Code, section 3730, which is set forth in Petitioners' Appendix at pages 95 to 113. The pertinent subsection of that statute is set forth below.

31 U.S.C. section 3730(e)(4):

> "(A) No court shall have jurisdiction over an action under this section based upon the public disclosure

> of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

STATEMENT OF THE CASE

This is an action brought pursuant to the False Claims Act (31 U.S.C. sections 3729-32) by a coalition of welfare rights organizations and others to recover damages and civil penalties on behalf of the United States. Petitioners allege that State of California and Sacramento County officials falsely submitted claims to the federal government to collect payments for the administration of certain federal child welfare services programs. The District Court for the Eastern District of California dismissed the action for lack of subject matter jurisdiction and the Ninth Circuit Court of Appeals affirmed.

The evidence in the record at both the district court and appellate levels established that this action is based upon publicly disclosed allegations found in court documents and administrative hearing decisions. The action was dismissed under the jurisdictional bar of 31 U.S.C. section 3730(e)(4)(A). Petitioners did not qualify under the "original source" exception, because they did not satisfy the second element of this exception: no information was provided to the federal government before filing the action.

Petitioners contend that this action is not based on publicly disclosed allegations; that they have direct and independent knowledge of the information on which the allegations are based; and, that such information was transmitted to the federal government before filing the action. No evidence was submitted by petitioners to support these contentions.

REASONS FOR DENYING WRIT

I. THERE IS NO CONFLICT BETWEEN DECISIONS OF COURTS OF APPEALS CONCERNING THE JURISDICTIONAL BAR OF 31 U.S.C. SECTION 3730(e)(4)(A) WHERE THE ACTION IS BASED ON COURT RECORDS, TRANSCRIPTS OF COURT PROCEEDINGS AND A NEWSPAPER ARTICLE.

Actions under the False Claims Act are required to initially be filed under seal and served on the United States with "substantially all material evidence" possessed by the *qui tam* plaintiffs. (31 U.S.C. section 3730(b)(2).) The United States submitted an *amicus curiae* brief to the district court addressing the motion to dismiss, and therein attached copies of the documents provided to the United States with the complaint. (CR 85)[1]. The only documents included were administrative hearing decisions; documents from the Sacramento County Superior Court, including a complaint and a transcript of a proceeding; and, two opening briefs from the files of the California Court of Appeals, Third Appellate District.

Discovery conducted by respondents also indicated that petitioners' action is based upon a newspaper article published in the *Sacramento Union*, and unidentified documents obtained from the California Department of Social

[1] In this brief, the letters CR will be used to designate references to the "Certificate of Record" prepared at the time of appeal from the district court to the court of appeals. These references are being provided to aid this Court in requesting documents from the courts below, or from the parties, should the need arise.

Services through the Freedom of Information Act. (CR 75).

The district court concluded that all of these documents were publicly disclosed prior to the filing of the action. (Appendix to Petition, pages 80-85). The court of appeals agreed, making special note of the state Superior Court civil complaint and the newspaper article. (Appendix to Petition, pages 4-5).

Petitioners are correct in stating that there is some disagreement between the circuits as to whether the jurisdictional bar covers all documents within the public domain or only those in the enumerated categories. The first and eleventh circuits have adopted a narrow interpretation, finding that the list of methods of public disclosure in section 3730(e)(4)(A) is specific. *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991), *U.S. ex rel. LeBlanc v. Raytheon Company*, 913 F.2d 17, 20 (1st Cir. 1990). The second and third circuits are supportive of a broader reading of the statute. *U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 15-16 (2d Cir. 1990), *U.S. ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1155-1160 (3rd Cir. 1991).

The petitioners are wrong, however, in indicating that this interpretative issue has any relevancy to this case. (Petition at page 13). Even under the most stringent interpretation of 31 U.S.C. section 3730(e)(4)(A), the district court lacked subject matter jurisdiction over this case. The documents identified above fall squarely within the categories enumerated in 31 U.S.C. section 3730(e)(4)(A), which include allegations publicly disclosed in "civil hearings", "administrative hearings" and from "the news media".

II. THE DECISION TURNS PREDOMINANTLY UPON AN ANALYSIS OF THE FACTS INVOLVED, AND THE FINDINGS OF FACT OF THE DISTRICT COURT RECEIVED THE CONCURRENCE OF THE COURT OF APPEALS.

Petitioners argue that the complaint was not based upon the documents identified above, but upon "independent research and investigation". (Petition, page 11.) This argument was made to both courts below. The district court held that the petitioners had failed to rebut the showing that the action was based upon the public documents submitted to the United States, and the court of appeals affirmed this holding. (Appendix to Petition, pages 4-5, 85).

Petitioners contend that, assuming a reliance on public records, they should escape dismissal of their action because they provided the information to the United States before filing the complaint. The United States says no information was received prior to the filing of the complaint. (CR 85). Both the district court and the court of appeals found that petitioners were required to come forward with evidence outside the pleadings, and they failed to offer any evidence that they met this jurisdictional requirement. (Appendix to Petition, pages 5-6, 82-83).

This Court has stated that "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). The Court has also frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623, 73 L.Ed.2d 1012, 1021, 102 S.Ct. 3272 (1982).

In this case, both the district court and the court of appeals determined that petitioners were required to present evidence to support their jurisdictional allegations, relying upon *Trentacosta v. Frontier Pacific Aircraft Industries*, 813 F.2d 1553 (9th Cir. 1987) for their holdings. The *Trentacosta* court stated that:

> "If [a motion to dismiss for lack of subject matter jurisdiction] simply challenges the sufficiency of the allegations of subject matter jurisdiction, then the pleadings contents are taken as true for the purposes of the motion. However, if it challenges the actual existence of subject matter jurisdiction, then the pleadings allegations are merely evidence on the issue. Since the party invoking the Federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction, regardless of the pleadings allegations, the courts have held that *the pleader must establish jurisdiction with evidence* from other sources, such as affidavits or depositions." *Trentacosta v. Frontier Pacific Aircraft Industries, supra*, at page 1558-1559 citing 5 C. Wright and A. Miller, *Federal Practice and Procedure*, section 1363, at page 653-654 (1969). (Emphasis added).

It is noted that Petitioners have not challenged this legal standard, nor have they asserted that the standard was misapplied. Both courts below determined that petitioners had failed to offer any evidence in support of jurisdiction. (Appendix to Petition, pages 6-7, 85). This evidentiary determination of the two courts below should not be disturbed.

III. THE COURT OF APPEALS DID NOT FIND THAT PETITIONERS ARE "ORIGINAL SOURCES".

At three separate places in their petition, petitioners grossly misstated a ruling of the court of appeals. They contend that:

> "The Ninth Circuit altered the District Court's ruling and determined that Plaintiffs 'were original sources'." (Petition, page 18). (See also pages 10 and 22 of Petition).

To the contrary, the Ninth Circuit found exactly the opposite:

> "Even if the information relied upon by plaintiffs was publicly disclosed, the action is not barred if

> plaintiffs are the original source of the information. 31 U.S.C. section 3730(e)(4)(A). To qualify as an original source, a person must first have 'direct and independent knowledge of the information on which the allegations are based.' 31 U.S.C. section 3730 (e)(4)(B). There is no apparent dispute here that plaintiffs possessed such direct and independent knowledge. *Plaintiffs failed, however, to come forward with evidence that satisfied the second element of section 3730(e)(4)(B)—that they voluntarily provided information to the federal government before filing their action.*" (Appendix to Petition, pages 5-6). (Emphasis added).

The above statement establishes that petitioners are clearly in error in claiming that the court of appeals found them to be original sources. Petitioners' blatant mischaracterization tarnishes their credibility before this Court, and should be sufficient justification for denial of their petition.

IV. PETITIONERS ARE ATTEMPTING TO EXPAND THE SCOPE OF THE FALSE CLAIMS ACT.

The False Claims Act has been described as the Federal Government's primary tool for combatting fraud, and was originally enacted because of widespread fraud and corruption practiced in obtaining pay from the federal government during the Civil War. *Congressional Globe*, 37th Congress, Third Session, March 1863, page 952. It was never designed to reach every kind of fraud and was not designed to punish mistakes, incorrect claims, or negligence. *United States Code Congressional, and Administrative News*, 99th Congress-2nd Session, December 1986, Legislative History, Public Law 99-562, at page 5272; *United States v. McNigh*, 356 U.S. 595, 599, 2 L.Ed.2d 101, 78 S.Ct. 950 (1958).

The False Claims Act has recently been applied to a variety of circumstances. (*United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983), endorsement of a govern-

ment check known to be issued by mistake; *United States v. Olsoacy*, 836 F.2d 439, 440 (9th Cir. 1987), submission of a form claiming nonreceipt of a social security check to the Treasury Department when in fact the check was received; *United States v. Jackson*, 845 F.2d 876, 881 (9th Cir. 1988), submission of a form to the Veterans Administration alleging nonreceipt of eductional benefits, when in fact the checks had been received, endorsed, cashed or deposited).

Respondents are unaware of any actions brought against states under the False Claims Act, and there is only one reported case involving a local government entity. (*See, United States v. Board of Education of City of Union City*, 697 F. Supp. 167 (D.N.J. 1988)). By this action, petitioners are seeking to use the False Claims Act to challenge state and county administration of certain federal child welfare services programs. The Congressional purpose, the historical development, and the judicial interpretation of the False Claims Act do not support its expansion into the administration of governmental services.

V. THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION BY NOT ALLOWING PETITIONERS TO AMEND THE COMPLAINT, AND BY DENYING PETITIONERS' MOTION FOR RECONSIDERATION.

While it is true regarding requests to amend that leave shall be freely given when justice so requires (*Foman v. Davis*, 371 U.S. 178, 182, 9 L.Ed.2d 222, 226, 83 S.Ct. 227, 230 (1962)), the propriety of a motion for leave to amend is determined by reference to "undue delay, bad faith, futility of amendment, and prejudice to opposing party . . ." (*U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991).) The key factors in the decision of the district court were that the "proffered amendments were futile and prejudicial to the respondents." (Appendix to Petition, page 8.)

The burden to demonstrate that proper subject matter jurisdiction existed rested with the petitioners. (Appendix to Petition, pages 42-43; CR 123, page 15, lines 7-11.) The petitioners failed to provide any evidence. (Appendix to Petition, pages 5-6). This deficiency cannot be cured by merely amending the pleadings. As the district court stated:

> "The changes that they request to make by amendment do not cure the jurisdictional defects . . ." (Appendix to Petition, page 57; CR 123, page 23, lines 9-11.)

The petitioners thereafter moved for reconsideration of the district court's order dismissing this action, and for the first time, petitioners submitted affidavits allegedly establishing proper subject matter jurisdiction. (Petition, page 16.) During the hearing on reconsideration, the district court stated:

> ". . . petitioners have not shown that the evidence submitted, declarations with attached letters from 1987 and 1988, were not within petitioners' possession at the time of the last hearing in November 1990. Therefore, under both the Frederick S. Wyle case and Local rule 230(k), they have not shown entitlement to reconsideration on the basis of newly discovered evidence." (Appendix to Petition page 49; CR 123, page 18, lines 23-25, page 19, line 1.)

In reviewing the district court's refusal to allow petitioners to file an amended complaint, the court of appeals found that the district court had properly exercised its discretion:

> "We also find no abuse of discretion in the court's refusal to allow plaintiffs to file an amended complaint. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (applying abuse of discretion standard). The court reasoned that the proffered amendments were futile and prejudicial to the defendants. Both grounds are sufficient to justify rejection of an amended complaint. *See id.* at 1387.

> Moreover, a third factor is relevant here. 'Where a party seeking amendment knows or should know of the facts upon which the proposed amendment is based, but fails to include them in the original complaint, the motion to amend may be denied.' *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir.), *vacated and remanded on other grounds*, 459 U.S. 810 (1982)."

And in reviewing the district court's denial of petitioners' motion for reconsideration, the court of appeals found that the district court did not abuse its discretion in denying reconsideration, as "Plaintiffs failed, however, to offer adequate grounds to explain why they did not present their evidence before dismissal." (Appendix to Petition, pages 7-8).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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